

1 David Lochabay  
Asst. Attorney General  
2 OFFICE OF THE ATTORNEY GENERAL  
2nd Fl., Juan A. Sablan Admin. Bldg.  
3 Capital Hill  
Caller Box 10007 CHRB  
4 Saipan MP, 96950  
Tel: 664-2341  
5 Fax: 664-2349  
E-mail: lochabay@gmail.com

6 Attorneys for Jonas Barcinas

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8 **IN THE UNITED STATES DISTRICT COURT**  
**FOR THE**  
9 **NORTHERN MARIANA ISLANDS**

10 **HOMAYAN KABIR,**

11 **Plaintiff,**

12 **v.**

13 **CNMI PUBLIC SCHOOL SYSTEM, and**  
**JONAS BARCINAS**

14 **Defendants.**

) **No. CV 07- 0034**  
)  
)

) **REPLY TO RESPONSE TO**  
) **BARCINAS'S MOTIONS TO**  
) **DISMISS AND SUBSTITUTE**

) **Hearing Date: April 24, 2008**  
) **Time: 8:30 a.m.**  
) **Judge: Munson**  
)

15 **COMES NOW** Defendant Jonas Barcinas, who would now file this Reply to Plaintiff's  
16 Response to Barcinas's Motions to Dismiss and to Substitute.

17 **I. MOTION TO DISMISS**

18 Plaintiff concedes that the Motion to dismiss Barcinas from the First Cause of Action should be  
19 granted. (Pl. Response, pp. 1-2).

20 **II. MOTION TO SUBSTITUTE**

21 Plaintiff opposes the Motion to Dismiss Defendant Barcinas as to the Fourth Cause of Action  
22 and substitute the CNMI as the defendant in his stead.

23 Plaintiff argues that the Certification of Scope of Employment filed by the Attorney General in  
24 this cause, in which the Attorney General certified that Defendant Barcinas was acting within the scope  
25 of his employment when the actions complained of by Plaintiff (sexual harassment - grabbing and  
26 kissing)(hereinafter "the incident") allegedly occurred, is subject to challenge, as these actions constitute  
27 the intentional tort of assault and battery and Barcinas could not have been acting within the scope of  
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1 his employment at the time because such actions would not serve any purpose of his employer, the  
2 CNMI Public School System.

3 An Attorney General issuing a Certification under CNMI P.L. 15-22 or the Federal Westfall Act  
4 does not have to accept the version of facts set forth by a plaintiff in a Complaint. If the Attorney  
5 General's investigation concludes that the complained of conduct simply did not occur, the Attorney  
6 General may certify that the employee was acting within the scope of his employment for purposes of  
7 P.L. 15-22 or the Westfall Act. *Osborn v. Haley*, 127 S.Ct. 881, 897-98, 166 L.Ed.2d 819 (2007) ("We  
8 agree that Westfall Act certification is proper when a federal officer charged with misconduct asserts,  
9 and the Government determines, that the incident or episode in suit never occurred. . . so a complaint's  
10 charge of conduct outside the scope of employment, when contested, warrants immediate judicial  
11 investigation. Were it otherwise, a federal employee would be stripped of suit immunity not by what  
12 the court finds, but by what the complaint alleges. . . In sum, given the purpose of the Westfall Act to  
13 shield covered employees not only from liability but from suit, it is altogether appropriate to afford  
14 protection to a "negligent. . . employee . . . as a matter of course. . ." (cite omitted) . . . But it would make  
15 scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself  
16 when he denies wrongdoing and asserts he "engaged only in proper behavior occurring wholly within  
17 the scope of his office or employment. . . (cite omitted) . . It is illogical to assume that Congress  
18 intended to protect guilty employees but desert innocent ones.").

19 In the case at bar, the Attorney General has investigated plaintiff's claim and determined that the  
20 complained of conduct did not occur. (Ex. 1, Declaration of Matthew T. Gregory).

21 Also attached to this Reply are the declarations of Jonas Barcinas (Ex. 2), Elphidia Sablan (Ex.  
22 3), and David M. Borja (Ex. 4).

### 23 III. STATUTE OF LIMITATIONS

24 Some of Plaintiff's allegations concern conduct alleged to have occurred before November 9,  
25 2005. Such allegations are barred on their face by the statute of limitations (the Complaint was filed  
26 November 9, 2007). 7 CMC § 2503. Any consideration of these time-barred allegations is strictly for  
27 purposes of determining scope of employment in this proceeding and Barcinas does not waive his right  
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1 to assert the statute of limitations as a defense by answer or another motion.

2 **IV. CONCLUSION**

3 The Attorney General may, and has, certified that the conduct complained of did not occur.

4 The attached declarations show that the only relationship of Barcinas and Kabir was work  
5 related.

6 The Motion to Substitute the CNMI as a defendant and dismiss Barcinas should be granted.

7 Respectfully submitted,

8  
9 /s/ David Lochabay  
10 David Lochabay  
11 Asst. Attorney General  
12 Office of the Attorney General  
13 Attorney for Jonas Barcinas

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that the above and foregoing has been e-filed this 10th day of April, 2008, with  
14 service requested to O'Connor Berman Dotts & Banes, attorneys for Plaintiff.

15 /s/ David Lochabay  
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